UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	
CASSAVA SCIENCES, INC.,	:	Docket #1:22-cv-09409-GHW-OTW
Plaintiff,	:	
- against -	:	
BREDT et al,	:	New York, New York March 8, 2023
Defendant.	:	
----------	:	INITIAL CASE MANAGEMENT CONFERENCE

PROCEEDINGS BEFORE
THE HONORABLE ONA T. WANG,
UNITED STATES MAGISTRATE JUDGE

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Witness	Direct	Cross	Re-Direct	Re-Cross
None				

E X H I B I T S

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None				

THE CLERK: This is 22-civil-9409, Cassava Sciences, Inc. v. Bredt et al, before the Honorable Ona T. Wang.

Please state your appearances for the record.

MR. ERIK CONNOLLY: This is Erik Connolly and Tim Frey on behalf of Cassava Sciences.

HONORABLE ONA T. WANG (THE COURT): All right, good morning.

MR. JOSHUA KALLMAN BROMBERG: Joshua Kallman Bromberg of Kleinberg, Kaplan, Wolff & Cohen, P.C. on behalf of defendant, Quintessential Capital Management LLC. And I'm joined by my colleague, David Levy.

MS. MEGHAN K. SPILLANE: Good morning, your Honor. Meghan Spillane from Goodwin Procter on behalf of Dr. Bredt and Dr. Pitt.

MR. DAVID ROBERT SHINE KUMAGAI: Good morning, your Honor. David Robert Shine Kumagai on behalf of Jesse Brodkin and Enea Milioris and Adrian Heilbut. And with me is Isaac Zaur and Dan Wachtell.

THE COURT: Okay. This is a little more complicated than some of my typical Initial Case Management Conferences. So I understand, I think, plaintiff's claims. But why don't I just get a brief overview. And then with defense counsel, everybody will get a chance to speak. I

just want to understand who the defendants are and how they fit in with each other.

The other thing I'm going to ask plaintiff's counsel to do is to talk to me a little bit about what the status is of any regulatory or criminal investigations, to the extent you know.

MR. CONNOLLY: Okay. Thank you very --

THE COURT: And can disclose -- I'm sorry.

MR. CONNOLLY: And can disclose. Thank you very much. I appreciate that, your Honor. So I will try to describe the factual background but not in an aggressive or colorful way. The allegations here center around a company called Cassava Sciences. It's a biotechnology company, and they are developing a drug they hope is successful in treating Alzheimer's disease. They have gone through a series of tests already --

THE COURT: And what's the -- I'm sorry -- I should know this, because I've seen it, but I can't recall the name of the drug off the top of my head.

MR. CONNOLLY: Simufilam.

MR. TIMOTHY FREY: Your Honor, it's S-i-m-u-f-i-l-a-m.

MR. CONNOLLY: So they went through a series of the mandatory testings and have now been approved by the

FDA for what's called the third-phase testing, which is the last set of tests that you do before you go to market with the drug.

What Cassava has alleged is that each of these group of defendants published defamatory information about them in order to make money from a decline in the company's equity price. So each of the defendants are alleged to be short sellers of Cassava's equity. And the way that the short sellers can make money is if the equity price goes down. And so what Cassava has alleged against each group is that at different times and in different publications they each made some fraudulent statements about Cassava.

Cassava's perspective on it is that the statements that they made were essentially defamation per se because they were accusing the company of being a fraud and fabricating data. Fabrication of data is a crime, particularly when it's associated with regulatory issues or securities issues. And so, from Cassava's perspective, they think the case is a case of defamation per se against each of the defendants for their publications for accusing them of being a fraud and accusing them of committing a crime of fabricating data. That is the allegation.

The defendants have multiple publications that they've done. There are what we've called the citizens

petition defendants, which are Drs. Bredt and Pitt, who --

THE COURT: Okay, slow down.

MR. CONNOLLY: I apologize. I apologize.

THE COURT: Drs. Bredt and Pitt.

MR. CONNOLLY: Correct. They published what is alleged to be the defamatory material in what's called Citizen's Petitions to a regulatory body and then in some supplements to those, as well. The other defendant, QCM, Quintessential Capital Management, published the allegedly defamatory materials in a report that they posted on their website and then in some social media postings, as well. There is a dispute over whether or not the company QCM is accountable for the social media posts by their founder. So that is a contested issue, but obviously, Cassava has alleged that they are.

THE COURT: And the founder is whom?

MR. CONNOLLY: Grego, Mr. Grego.

THE COURT: And he is or is not a defendant?

MR. CONNOLLY: He is not a personal defendant.

THE COURT: Okay.

MR. CONNOLLY: And then the last group, which we've called the dot-com defendants, is a collection of, currently before the Court, three defendants that also published a series of reports and a PowerPoint presentation

and social media post making similar accusations regarding Cassava being a fraud and Cassava fabricating data.

So we have for each set of the defendants what I would call one main -- one or two main publications and then for some of the defendants we've got social media postings, as well, not for each of the defendants.

I hope that wasn't too colored. I felt like that was pretty neutral.

THE COURT: Okay. so then talk to me about the regulatory and criminal investigations, then.

MR. CONNOLLY: So what Cassava can say about that is those investigations from Cassava's perspective were triggered as a result of the defamatory statements made by these defendants and that there is no basis to any of those. Nothing has been formally brought against them, and so from Cassava's position, that will amount to nothing. But then Cassava came under the scrutiny because of the defamatory publications of these defendants. I'm certain the defendants disagree with that, but from the Cassava perspective that is the origin story for those, as well. But at this point I can tell you there has been nothing formally announced.

THE COURT: Okay, which or where were the investigations, or is that something you can't disclose?

MR. CONNOLLY: I cannot disclose any of that information.

THE COURT: And you cannot -- can you disclose if they're closed?

MR. CONNOLLY: I actually don't think I am allowed to say that one way or the other. I believe with most investigations, until there's a formal announcement by the agency, I am prohibited from making any statement. And that would be a violation of Cassava's interactions with any agency.

THE COURT: Well, that seems like it might be an important trigger point as far as proving truth or not, no?

MR. CONNOLLY: No, not at all, actually.

THE COURT: Would it be material to truth?

MR. CONNOLLY: We don't think so at all. The investments will run the course that they are going to run. Obviously, I have other clients that I deal with that are investigated, and I have civil proceedings that continue. The issue, what this case really comes down to is whether or not Cassava is a fraud, as alleged by the defendants, or did Cassava fabricate its data. Those are historical events. Cassava can readily establish that neither of those things are true. And from Cassava's perspective with that proof, falsity is established, and the focal point of

the case becomes, as it does in most defamation cases, actual malice, if I have to satisfy that standard, which I don't concede I do.

THE COURT: Okay. I mean, I guess in reading between the lines, and maybe anticipating what some of defense counsel might say is well, there's been no formal charges yet -- with "yet" being the operative word. But, be that as it may, I guess if the process hasn't run its course, the process hasn't run its course, and we don't know one way or the other, right?

MR. CONNOLLY: You don't know one way or the other, which --

THE COURT: Okay.

MR. CONNOLLY: -- is why Court's typically don't look at the potential of I'll call "sister" investigations as a factor of whether or not you can initiate your civil litigation. I get to start my civil litigation, I get --

THE COURT: Oh, yes.

MR. CONNOLLY: -- to start my discovery. If that happens, certainly -- and, certainly if something like that happens, we could all be back here in a very different posture. But, at the same token, I with some certainty -- I'm not a defense attorney here -- but if those don't result in any indictments or any filings, I doubt the

defendants are going to say, "But we'll stipulate to falsity, then, because it didn't run its course." So --

THE COURT: Well, I wasn't sort of talking about merits in the end or of the, you know, of anything being necessarily dispositive of an element yet, with "yet" being the obvious word, with "yet" being actually a very important word. I mean, when I was in private practice and often on the defense side but sometimes on the plaintiff's side, if there were parallel proceedings -- I won't gender them -- but if there were parallel proceedings, either regulatory or criminal, we would sometimes be asked to put the brakes on in the civil proceeding, so -- which, of course, brings us to the motion to stay but which I will put that to the side because I do want to hear from the defendants, the defendant groups and, you know, to the extent you can, talk to me about how this even came up, meaning, you know, how were these statements made. I'm assuming or I would hope that, you know, what would come out in discovery, if discovery were to proceed, would be that, you know, the defendant had some reason other than or had some indication or suggestion other than just making it up in their heads to say what they said. Like I said, I'm not asking for major disclosures; but, again, to the extent that some of this might be helpful, it might also be

helpful for me to understand the motion to stay and where it falls and, you know, where the various factors fall.

So anybody can start.

MR. BROMBERG: Good morning, your Honor. Joshua Bromberg again on behalf of Quintessential Capital Management. Without going too deeply into the merits, which are I think set forth in our motion to dismiss, we think this is a garden-variety SLAPP suit, and it's been filed by Cassava as retaliation against the multitude of different defendants for public statements made on the subject of a topic of very important public interest, namely the testing and the science behind this new Alzheimer's drug.

Our position has been, again as stated in our motion to dismiss, that these statements not only were substantially true but they were opinions or otherwise not defamatory. They were not made with actual malice, as Cassava is required to prove here, either under longstanding First Amendment case law or under the New York anti-SLAPP statute. And, finally, none of the statements made by the defendants can be shown to have caused any damages to Cassava as a matter of law. Those are the defenses that are common, as I understand it, to all of the defendants. And there are various individualized defenses

that have also been asserted.

I will hold off on explaining to your Honor why we think the discovery stay is appropriate unless --

THE COURT: Yes, why don't you hold off for now. So QCM on its own published -- let's see, published materials in a QCM-issued report on its website, and the founder also said some things in a social media post?

MR. BROMBERG: Correct, your Honor. There was a report published on QCM's website, and subsequently there were a number of Twitter posts made by Gabriel Grego, who is the principal of QCM. The reason for these, of course, we concede that our client is a short seller, but what was not mentioned in the Complaint -- obviously, this is outside the record and will eventually be -- will be uncovered in discovery, if we get that far. We don't think that's appropriate, but Quintessential Capital Management has a very long track record of uncovering corporate fraud and has as virtually unblemished record in that regard.

THE COURT: All right, next?

MS. SPILLANE: Your Honor, as I stated previously, I represent Dr. Bredt and Dr. Pitt, who are two neuroscientists who submitted a series of publications before the FDA. Significantly, the first of their Citizen's Petitions before the FDA, which included a 39-

page Statement of Concern, was submitted on August 18th of 2021. They then submitted four subsequent times, on August 30th, on September 9th, on November 17th, and finally on December 8th. They had enlisted a law firm to submit these Citizen's Petitions on their behalf. In them, consistent with what you heard from my colleague, they evidenced anomalies in the data and apparent errors in the data that gave them serious concerns that it was possible that the data had been manipulated.

As you will see from our motion, which is fully submitted, everything they said in the reports is backed up with publicly available data that they attached, much of which was actually annexed to the Complaint itself.

And, significantly, your Honor, while the first publication was on August 18th -- of course, the Complaint was not filed until November 2nd of 2022, which was over a year later, and the identities of Dr. Bredt and Dr. Pitt were known as of November 17, 2021. So not only was the first publication of the Citizen's Petitions long before the one-year statute of limitations, but the identity of both doctors were known well before the filing.

So our motion to dismiss papers have been fully submitted, and we echo many of the defenses that have already been raised. But one that is particular to my

clients is, of course, a statute of limitations defense based on the first-publication rule.

THE COURT: Okay.

MR. KUMAGAI: Your Honor, David Kumagai on behalf of the dot-com defendants, Brodkin, Milioris and Heilbut. So our motion to dismiss is going to be filed tomorrow and then fully briefed by May 5th. And, broadly, there are many of the same arguments you heard from the other defendants; but there are two general aspects of our motion. The first is that we're moving under Rule 12(b)(2) for lack of personal jurisdiction over defendants Brodkin and Milioris. Both defendants are out of state; there's no allegation either of them ever set foot in New York in connection with these challenged statements. And plaintiff Cassava is also out of state; they're a Delaware company based in Texas. So that will be as to two of the dot-com defendants, Brodkin and Milioris.

And then, second, we're moving under 12(b)(6) to dismiss claims against all three of our clients, Brodkin, Milioris and Heilbut. And the arguments are broadly consistent with the arguments from the other defendants. And as you'll see in our motion, your Honor, we are especially focused on the context of this case, which really is under the case law important, critically

important to keep in mind when evaluating these allegedly defamatory statements. So all of the challenged statements were made within this context of a very public, very intense scientific debate over Alzheimer's research generally and Cassava's drug Simufilam, in particular. And it really is a novel area of scientific debate. And the Second Circuit in the *Ony* case from 2013 has very strongly cautioned Courts against trying to referee these types of debates involving novel scientific claims.

So we'll argue that the defamation claims fail for three reasons. First, Cassava cannot plead falsity. And really, to answer your earlier question, your Honor, about what the impetus for these statements was, it's all based on publicly available data, including -- from Cassava, including the CEO admitting errors in the research, both their clinical studies and underlying research papers. And those are the errors that defendants have all been calling out in their statements and, you know, drawing the conclusion and expressing the opinion that they are signs of possible data manipulation. There's also been seven scientific journals retracting or correcting articles published by Cassava's lead researcher for its drug, and these are --

THE COURT: Did you say several or seven?

MR. KUMAGAI: Seven.

THE COURT: Seven. Okay, what journals were they?

MR. KUMAGAI: So the first one is *Plus One*. The second is *Alzheimer's Research in Therapy*. The third is *Molecular Nerve Degeneration*. The fourth is *Neuroscience*. The fifth is *The Journal of Neuroscience*. The sixth is *Neurobiology of Aging*. And the seventh is *Physiology and Behavior*. And we'll cite those in our motion to dismiss tomorrow.

THE COURT: Are they all peer-reviewed journals?

MR. KUMAGAI: Your Honor, I believe so, but I can't confirm.

THE COURT: Okay. Are there -- and this might be a question for Cassava counsel, for plaintiff's counsel -- are there continuing to be statements or reports or coverage of this drug and these issues along the lines of -- I saw a mention in the 26(f) report that Cassava may need to amend its Complaint?

MR. CONNOLLY: This group of defendants, some of these defendants, have continued to publish defendant statements about Cassava since the filing of the Complaint. So there is some ongoing defamation that has taken place since the filing of the Complaint. The Court will have to evaluate the amendment of the Complaint to encompass those

at a future date and time. Typically the way that works for the defamation cases is if the new defamatory statements are of the same ilk, same nature as the existing ones. You can amend it, and you can bring it back in at a subsequent date due to a lack of bias to the defendant. But that's the typical evaluation that we do.

THE COURT: Okay. All right, and I see that there is at least one defendant who needs to be served in Germany, still.

MR. CONNOLLY: Yes. So --

THE COURT: Who's that defendant?

MR. CONNOLLY: Mr. Markey. Mr. Markey would be part of the dot.com defendant group, or at least that's the naming that we have used for convenience's sake. His counsel in good faith was, I believe, working to determine whether or not they would accept service. Once they indicated to us that Mr. Markey would not be accepting service through counsel, we initiated the proceedings to serve it in the Hague. The documentation is with Germany now, and that will play out however that typically will play out. And I'm sure your Honor knows that that can take anywhere from a few months to a long time. And if I ultimately have to amend my roster to address that, I'll amend my roster to address that. We'll see what happens

there.

THE COURT: Okay, so what you're calling the Citizen's Petition groups are scientists, are Ph.D.'s who can and did apparently review the data, review the peer review journals. Are there any other scientist defendants in the other two defendants groups, or are they investors?

MR. CONNOLLY: Yes, your Honor. The dot.com defendants all have Ph.D.'s and are scientists, as well.

THE COURT: And so Mr. Markey should actually be Dr. Markey?

MR. CONNOLLY: I apologize, yes. I believe Mr. Markey is a Dr. Markey. I apologize. Then, that means --

THE COURT: Yes, because, I mean, this case -- I mean, one should say that in all circumstances, that matters; but in this case, it definitely matters.

MR. CONNOLLY: I absolutely respect that. Cassava's allegations in that regard is their status as doctors actually demonstrates the actual malice that we would not necessarily have in other circumstances. And so I certainly apologize. I did not mean --

THE COURT: Wait, so I'm trying to understand why if their status as Ph.D.'s would actually demonstrate actual malice; I'm just trying to understand that.

MR. CONNOLLY: There is a section in our Complaint that discusses common knowledge in the scientific community. It is at page 135. It begins at paragraph 316 and continues through to paragraph 330. And this is one of the -- I believe we have 50 or 60 paragraphs discussing the actual malice of these defendants. One of the primary reasons why their status as doctors bolsters the claim for actual malice is because they had knowledge that what they were calling anomalies or what they were calling irregularities were not indicia of fraud and were not indicia of fabrication. There is a potential that if I look at something with no scientific training whatsoever, I could says that seems like maybe that's fraud. But if you're a doctor and you actually study it, you know it's not.

And so one of the issues here is that that, in conjunction with all the other evidence, indicates that, well, you can say that something might be an anomaly; what the Court's don't let you do and what is an entirely different nature of defamation is claiming that something is a fraud or fabricated. There's a clear demarcation in the law on those two things. And from Cassava's perspective, the reason they brought the case, is that it crossed that line.

THE COURT: So, I mean, the law may have a clear demarcation, but my concern would be whether -- and, you know, I'm just speaking -- you know, I have not done a deep dive into this, I've not done a deep dive into the law, for sure; but is it possible that there's something in between fabrication and fraud and perfectly fine data that just has anomalies that could be what, when I was a scientist, would have called sloppy science, right, that there is -- you know, the controls that are in place -- and I don't mean just your control group -- but controls and guardrails around the research and the procedures that are in place are not -- that they could be indicative that those actual procedures weren't always followed. And that could be -- to use a discovery and spoliation analogy, it could be one of those things where it's like somebody didn't destroy the documents intentionally, I mean, the act was intentional that they were destroyed but it was just inattention, negligence, failure -- lack of care around a certain set of procedures. I'm not saying that that happened with Cassava; I'm just saying that this -- you know, I'm -- I question -- and I guess it might come down to what the actual anomalies are -- whether certain defendants having a deeper background and a scientific background actually cuts one way or the other.

MR. CONNOLLY: Sure. And I would give three responses to that, if you allow me --

THE COURT: Yes, go ahead.

MR. CONNOLLY: -- and I'll keep it brief, obviously. The first is what is alleged in the Complaint does not fall into the category of the gray area, as you have described it. Cassava alleges in the Complaint, in pretty excruciating detail, that that is not the case here, and it's all factual allegations. The second thing I would say is the gray area that you were discussing, that concept absolutely would end up, I expect, to be one of the hotly contested disputed issues of fact between the parties that, until we complete discovery -- and ultimately, the trier of fact would have to make a call on that -- but I do think you are correct in identifying something that once we get into the facts and we're not looking at the allegations, that's going to be hotly contested by the parties.

THE COURT: All right.

MR. CONNOLLY: And, briefly, your Honor, I'll just make one other reference. I know some journal articles were cited by the dot.com defendants. I would direct the Court's attention to paragraph 30 of the Complaint, which are the journal articles that at one point may have partially retracted and then flipped and said no, we see no

evidence of fraud here. And those are listed out in paragraph 30 of the Complaint for you -- I'm sorry-- 300, paragraph 300 -- too many zeros.

THE COURT: What a difference a zero makes.

MR. CONNOLLY: I know, I know. I don't know the last time I had a Complaint that wasn't over 100 pages. So this is --

THE COURT: I'll tell you that when we first -- when I was in private practice, I spent a lot of time working with the Madoff trustee in asset recovery. And when we were trying to figure out what various customers' purported losses were, I would read them and by like, "Oh, wow, they claim they lost $5 million -- oh, no, wait, I missed three zeros, I miscounted the commas and zeros."

So, let's look at the motion to stay. I don't really want to have full-blown argument -- oh, actually, before I do this -- I might have missed this in the Case Management Plan -- have you exchanged your initial disclosures yet? Yes.

MR. CONNOLLY: We did, we did.

THE COURT: All right. In light of all the other things going on in this case, my leaning had been and has been, continues to be to stay discovery for a period of time. But I am willing to hear you out on why you think

that's not a good idea.

MR. CONNOLLY: Thank you, your Honor. I think I would focus here on burden, and I'd focus on prejudice, because I think the initial disclosures, which I'm happy to give your Honor copies of the --

THE COURT: No, I don't want to see them.

MR. CONNOLLY: But the -- I know you want more paperwork.

THE COURT: No, I don't.

MR. CONNOLLY: The initial disclosures demonstrate that there's actually no burden here and that the prejudice would be significant. So on burden, which is obviously the defendant's need to establish that the discovery is going to be oppressive and burdensome to them, we have not exchanged any interrogatories or requests for production, so none of that is out the door yet. And so no one can actually say it's going to be burdensome. And the one data point we do have on burden has to do with the identification that the parties have made of individuals with knowledge because those will be the custodians from whom this group of defendants would have to gather documents. Drs. Bredt and Pitt have only identified two people with relevant knowledge, themselves, in terms of things that they would have to collect documents from. QCM

has identified one person, their principal, as the only person with relevant knowledge; and so, therefore, you're talking about collecting documents from one person. The dot.com defendants didn't identify themselves at all as having release knowledge, but I'm going to assume that they do. And so that's three people.

THE COURT: Okay. Let me stop you right there.

MR. CONNOLLY: Yes.

THE COURT: I was actually thinking more about Cassava's witnesses. If there are parallel proceedings which cannot be disclosed, why are we not -- why would we end up in -- why would we put defendants through having to either seek documents or depositions or other disclosures? What do you do with a document request that says produce everything that has been provided to a regulatory or investigative agency; identify every single meeting you have had with any regulatory or investigative or criminal agency; let's depose somebody and have them take the Fifth multiple times until something is closed; why do we want to do that?

MR. CONNOLLY: First, you're presupposing something that is not accurate. I have not asserted the Fifth Amendment. And so you're claiming that my clients are --

THE COURT: I know. But what I am saying -- I am telling you this from my experience, both managing cases that have parallel proceedings for the last several years, as well as in my experience as a private practitioner working at the intersection of bankruptcy, criminal, SEC and civil proceedings. So I am asking you how do you respond to that, if your client gets document responses, requests for deposition, interrogatories that seek that information, the same information that you just said earlier you are not at liberty to disclose?

MR. CONNOLLY: So there is a fine distinction there, your Honor. So if you're asking me for the documents that have been provided to regulatory authorities, I absolutely can provide that information. That's going to be part of my document production already. If you're asking me for things that went to a DOJ, I'm absolutely giving you that already because I'm providing it, anyways, as part of my regular production. So the only -- I'm trying to think if there's any category of document request that I'm going to get hit with that I would have to assert anything that would prevent it from being disclosed. And I can't think of in this context anything.

And if there's concern about the regulatory

proceedings and the status of it are so gave, then I am happy to go back to my client and I'm happy to go back to the attorneys who are handling that directly to find out if I can give you a better update with respect to it. But right now, sitting here, I see no reason why I'm holding back anything from my production based upon those parallel proceedings. I just don't see it. And so it's speculative that I might have it. And if we have to wrestle with it and there is of 25 RFPs one that I have to go back and discuss with the Court, well, that's the exact same thing we do whenever we have an RFP that might have some disagreement over an attorney-client privilege assertion of it.

So I am not going to be holding back on proceeding with the discovery. My client needs to get discovery going, and they need to get it going fast because the one thing that we learned from the 26(a) disclosures is that the majority of the information or a very significant portion of the information that is critical to this case is in the hands of third parties. QCM identified nine third parties they said had relevant information. The dot.com defendants identified 40 third parties that they said had relevant information. I need to start issuing subpoenas to those third parties. I need to get discovery requests out

to them because they're under no preservation obligations at all. Indeed, I need interrogatories because I don't even know all the third parties that are at play right now. QCM in their report said that they relied upon a group of unnamed scientists. But when I read their 26(a)(1) disclosure, they're not there. So now there are some unnamed scientists that I still need to figure out who they are. So delay from my end risks losing discovery from the third parties that all the parties in their 26(a)(1)s said were highly relevant. And there's no reason to do that because I can't satisfy their burden element. They've got six custodians. I have far more that I have to deal with. I am taking on a bigger burden. They have six custodians. That's it. That's not burdensome under any measure.

MR. BROMBERG: Can I be heard on that, your Honor?

THE COURT: Yes. I would love for you to be heard on that.

MR. BROMBERG: So I'm not sure how Mr. Connolly can say that discovery will not be burdensome here because discovery will need to be taken not only from the six defendants who are before your Honor today but from the plaintiff, as to whom we expect there will be at least six, probably twice as many employees who need to be deposed, putting aside all of the document productions. And then,

as Mr. Connolly mentioned, there are literally dozens of third parties as to whom just documents will need to be taken and discovery -- depositions will need to be taken. And, in addition to all that, your Honor, there's Dr. Markey, who still hasn't been served. And then not only will there be the usual burdensome discovery of electronically stored information, but all of this information pertains to the subject matter of very complex scientific studies and academic papers, which can only vastly elevate the costs and burden of discovery, which include, of course, expert discovery, should that become necessary.

So that's what I have to say as to burden. Now, as to the regulatory proceedings, first of all, as your Honor noted, those regulatory proceedings are still ongoing. As my able co-counsel has informed me, only on the 28th of February Cassava filed its report stating that those proceedings are ongoing. I've also been informed by my co-counsel that the plaintiffs in the securities class action ongoing in the Western District of Texas requested documents from Cassava pertaining to the ongoing regulatory and criminal proceedings, and Cassava opposed that request. We would, of course, fully expect to make similar requests to Cassava. To the extent that those regulatory and

criminal proceedings are still ongoing, it's not clear that we'd be able to obtain the information that we're seeking at this juncture, which --

THE COURT: Let me just stop you right there. You said there's plaintiffs in a securities class action in the Eastern District of Texas who sought documents, and Cassava opposed those requests. They opposed them on the basis that there were ongoing parallel proceedings or for some other reason?

MR. BROMBERG: It's a Private Securities Litigation Reform Act, PSLRA automatically stays discovery in securities fraud cases until an MTD is decided, the motion to dismiss is decided.

MR. CONNOLLY: Can I speak to that, your Honor?

THE COURT: Yes.

MR. CONNOLLY: So --

THE COURT: Are you -- do you represent Cassava in the securities litigation?

MR. CONNOLLY: No, I do not, your Honor.

THE COURT: Okay, let's hear from Mr. Bromberg, then.

MR. BROMBERG: The Court can take judicial notice of Cassava's conduct in that securities class action. It's in the Western District of Texas. And contrary to the

position they're taking here, Cassava opposed the plaintiffs' motion for partial relief from the PSLRA discovery stay. And I'll quote from their brief. They say, "Here, plaintiffs have failed to show they will be unduly prejudiced by having to wait just a few more months to obtain the discovery at issue. After all, it is not as though they will be obstructed from obtaining the discovery forever, because the stay is temporary and lasts only unless and until plaintiffs' Complaint survives the motion to dismiss stage, when they will have access to all of the discovery material they seek." That's 21-cv-751-DAA, Western District of Texas, October 25th.

THE COURT: 21-cv-751?

MR. BROMBERG: 751-DAA, correct, your Honor. And that's Docket 82. And based on that argument, the Court in the Western District of Texas maintained the PSLRA discovery stay, and we believe the same result should obtain here. The Court should exercise its discretion to impose a stay until such time as the motions to dismiss have been adjudicated.

THE COURT: All right, let me hear again, Mr. Connolly, about -- or Mr. Frey about the third parties because if there is anything that I would be concerned about if there's a stay entered, I would be concerned about

preservation by potential third parties, preservation issues.

MR. CONNOLLY: I think there's two ways to approach that, your Honor. I completely understand my friend's argument regarding the concern about depositions and the costs associated with the depositions If the Court wants to stay depositions, I would be amenable to that so that we could focus on the documents --

THE COURT: Mr. Connolly, you're not answering my question. My question was --

MR. CONNOLLY: And this is where I was going --

THE COURT: -- preservation issues with third parties who may not be on notice of this lawsuit and a duty to preserve.

MR. CONNOLLY: So I need to be able to serve subpoenas to those third parties because that does start to trigger the obligation to preserve.

THE COURT: I know.

MR. CONNOLLY: And I do need at least some discovery --

THE COURT: Who are these third parties, and -- you don't have to identify them, but you have to explain to me why these third parties matter and why these third parties might not yet be on notice. I understand, I fully

get it, that a subpoena is for damn sure the start date, but that doesn't mean that they are not already on notice and could be, could have a duty to preserve already. So I'm trying to parse that out, okay?

MR. CONNOLLY: Sure. The third parties are the third parties that these defendants identified in their Rule 26(a)(1) disclosure statements. These defendants -- I'll use the dot.com defendants as my example -- identified 40 third parties that they claimed had relevant knowledge. They range from scientific journals to scientists to individuals who have done some testing on our drug to other individuals that they may or may not have been relying on for their statements. And so when I think through the third parties, there is a significant segment of them that are being identified by these defendants in their Rule 26(a)(1) disclosures as individuals that they are telling us have relevant knowledge.

THE COURT: Isn't that on them, then?

MR. CONNOLLY: No. I need that discovery because they might be using that to support their actual malice.

THE COURT: Right. But if they're going to use it to support their actual malice, then the documents exist and are preserved.

MR. CONNOLLY: Not -- no. If these third parties

had oral communications with any of these witnesses and these third parties have their own documents discussing what they did or did not know, I have to have that information. If you are relying on a third party as a source --

THE COURT: Doesn't it only matter what the third party told or provided to the defendants, which the defendants presumably would have?

MR. CONNOLLY: No. Because the credibility of the third party is the quintessential analysis of actual malice. If the third party is not a reliable source which I can establish with information in the possession of the third party, then you cannot rely on them for actual malice purposes. And in fact, what the case law says is your reliance upon them undermines your credibility.

THE COURT: Let me hear from the defendants who listed these third parties in their disclosures.

MR. KUMAGAI: Your Honor, Dave Kumagai for the dot.com defendants. So we don't understand Cassava's concern here. We actually understand that they've already served preservation notices on third parties that they believe to have relevant information, and so these are people that we think may have relevant information in support of our defenses. As Cassava's counsel noted,

they're scientists and --

THE COURT: Wait, wait, wait. Preservation notices have already been served by you?

MR. CONNOLLY: No, your Honor. We sent to the 19 third parties that we listed, we told them we have a lawsuit pending --

THE COURT: Okay. What about the third parties disclosed by defendants?

MR. CONNOLLY: I have not sent anything to them yet. Again, my letter doesn't have any binding authority, of course, but I have not sent it to them yet.

THE COURT: Let me decide whether that has any binding authority.

Let me hear from Mr. Kumagai. I mean, are the third parties on your initial disclosures, are they preserving documents? I mean, I don't understand. You're saying that third parties on your initial disclosures have already gotten preservation notices?

MR. KUMAGAI: Not from us, your Honor. We understand from our clients that some third-party notices have gone out. But we haven't sent notices yet to these individuals.

THE COURT: Okay. You know what, first ruling of the day. You're going to meet and confer and you're going

to figure out which third parties should get preservation notices and who's going to send them, and you're going to send them. Okay? This is for everybody. This is not just for plaintiffs, this is just for defendants. Okay, you're going to figure this out. But I don't see this as a reason to have everybody engaging in wholesale discovery. All right?

Was there anything, Mr. Connolly, or Mr. Frey, that you didn't get to say about the discovery stay otherwise that you would like to say? I'm not -- I told you where I'm leaning. I'm not going to rule except to temporarily stay any other discovery other than the meet and confer on the preservation notices until I actually issue a written order. Okay? I'm going to need to take some time to think about this. I'm going to need to see the transcript.

MR. CONNOLLY: Nothing further, your Honor.

THE COURT: Okay. Anything further that the defendants would like to add that's not in their papers or that's come up today that you would like to respond to?

MR. BROMBERG: Not from Quintessential, your Honor.

MS. SPILLANE: No, your Honor.

MR. KUMAGAI: No, your Honor.

THE COURT: All right, then, I am -- let me see if the dates -- I'll enter a discovery end date for now, just so that the docket system and all our internal systems don't have a big headache about the discovery end date. But because discovery is currently stayed for a short time until I formally rule on the discovery stay -- and I've already told you where I'm leaning -- that will probably get pushed and will get extended, depending on when the motion to dismiss is decided and how it's decided. Okay? So I understand it's December of 2023, so let's not worry about it right now.

Right now you are directed to meet and confer on preservation notices that need to go out to third parties, figure out all the third parties who need to get preservation notices, make sure they go out. Okay? Work together on that.

And then I think, because the motion to dismiss is pending, the burden is on me -- usually I don't let you go without another deadline that you have to follow -- but since I have all the homework now, I think I just have to go and do my homework. So can you resolve the third-party preservation notices in the next two weeks and then just file a joint status letter saying that you've resolved it? Or, if you need more time, explain to me why you need more

time.

And then if there is a final resolution that can be disclosed of any of the regulatory or criminal proceedings, don't assume I'm going to see it. Okay? I'll put that on plaintiff's counsel to file a letter letting me know if something has changed there. Okay? Otherwise, silence will mean you can't say anything one way or the other until you can. Okay? Because I think that might also be helpful in understanding the motion to stay. I mean, I don't think it will take that long; but in the event something happens next week, for example, that would be helpful.

MR. CONNOLLY: Sure.

THE COURT: Okay. Yes?

MR. KUMAGAI: Your Honor, sorry. Just to correct one minor point, I believe plaintiff's counsel mentioned that we had been retained to represent the defendant Markey, who has not been served yet. We did have discussions with him early on, but we have not been formally retained. So I just wanted to correct that point.

THE COURT: All right, so Dr. Markey is currently (indiscernible).

Okay, All right, anything else we need to do at this time?

MR. CONNOLLY: Not from the plaintiffs, your Honor.

THE COURT: Okay. Defendants? Any

MR. BROMBERG: No, your Honor.

THE COURT: All right -- oh, you know, one last thing, Case Management Plan, you had said you will discuss the possibility of settlement at the Rule 26(f) meet-and-confer. Is there anything you would like to talk about settlement-wise, either on the record, meaning you've decided and you want to do mediation or you might want to do something private or you're not ready; or is there anything you would like to discuss off the record, which I can also do?

MR. CONNOLLY: Not from the plaintiff's side?

MS. SPILLANE: No, your Honor.

THE COURT: Okay, anything off the record? Okay, we're going to close the record. I'm going to request the parties order a copy of the transcript. I understand there to be three groups of defendants, so I'm going to ask you to split the costs four ways. Okay?

All right. Thank you very much.

(Whereupon, the matter is recessed.)

C E R T I F I C A T E

I, Carole Ludwig, certify that the foregoing transcript of proceedings in the case of Cassava Sciences, Inc. v. Bredt et al, Docket #22-cv-09409-GHW-OTW, was prepared using digital transcription software and is a true and accurate record of the proceedings.

Signature /s/Carole Ludwig

Carole Ludwig

Date: March 13, 2023